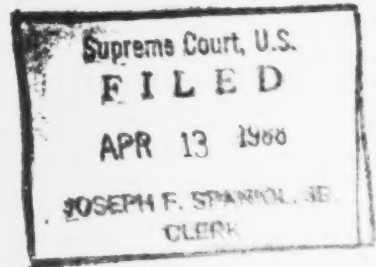


87-1766



CASE NO.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

JOSE JAVIER JARAMILLO-MONTOYA,

Petitioner,

v.

UNITED STATES OF AMERICA,-

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEAL,
SECOND CIRCUIT

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QUESTIONS PRESENTED

WHETHER THE TRIAL COURT'S IMPOSITION OF CONSECUTIVE SENTENCES AMOUNTING TO A TERM OF THIRTY-NINE YEARS IMPRISONMENT PLUS FIVE YEARS PROBATION WAS SO DISPROPORTIONATE THAT IT VIOLATES THE EIGHTH AMENDMENT PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT?

WHETHER THE IMPOSITION OF CONSECUTIVE MAXIMUM SENTENCES FOR MULTIPLE 21 U.S.C. SECTION 843(b) OFFENSES VIOLATES THE CONSTITUTIONAL PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT AND DOUBLE JEOPARDY WHERE THE TELEPHONE CALLS TAKEN INDIVIDUALLY DO NOT SEPARATELY FACILITATE THE UNDERLYING CONSPIRACY?



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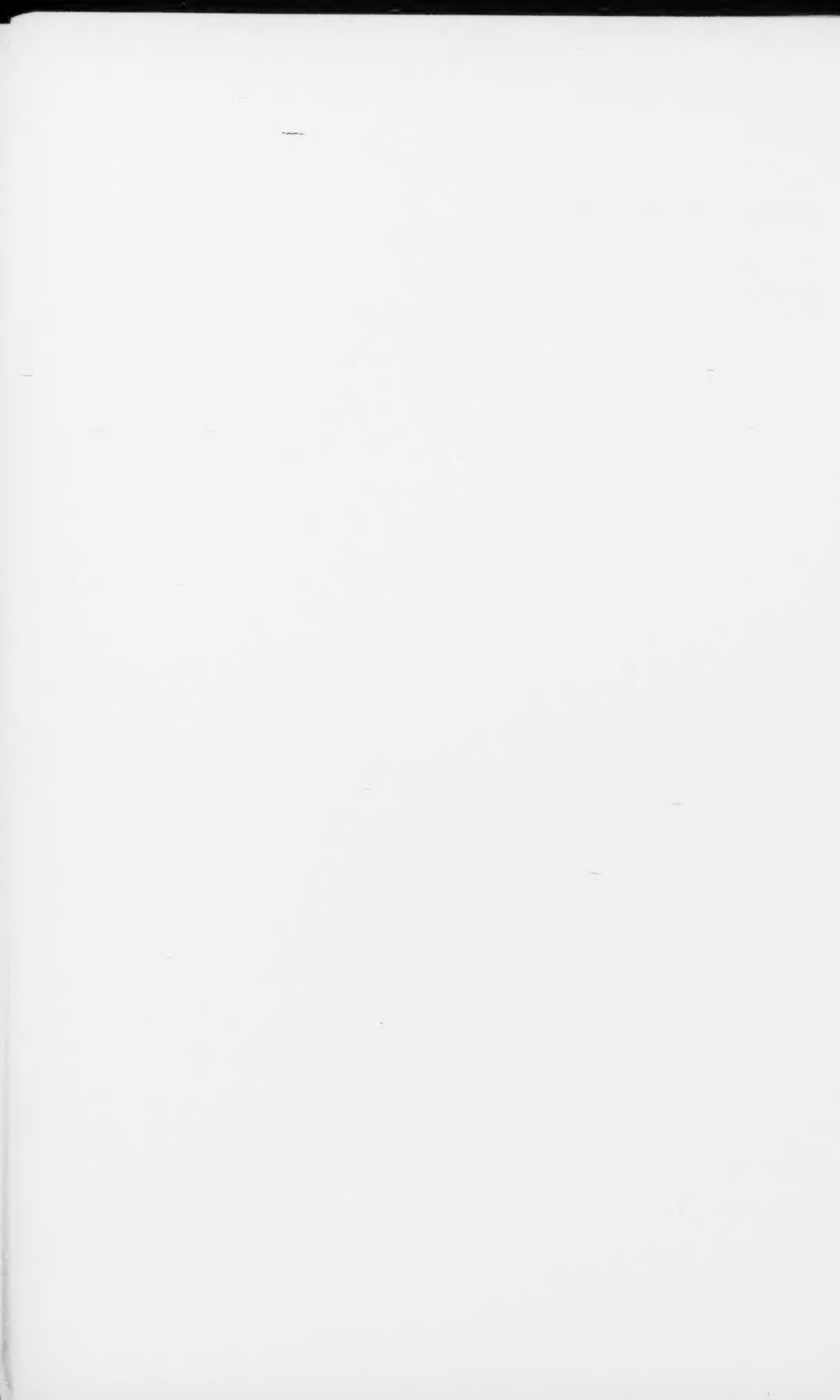


REPORT OF OPINION BELOW

United States v.

Jaramillo-Montoya.

834 F.2d 276 (2d Cir. 1987)

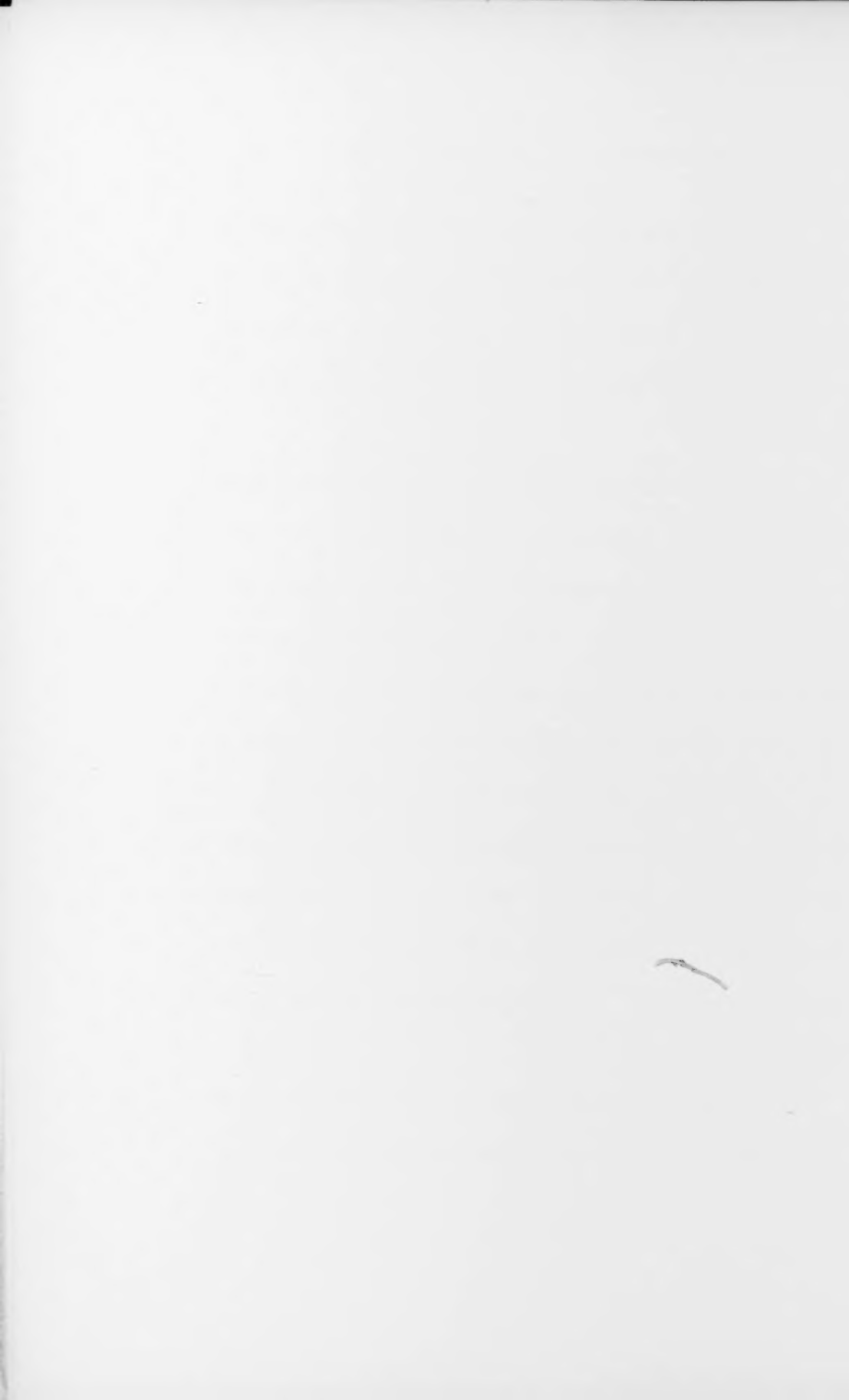


STATEMENT OF JURISDICTION

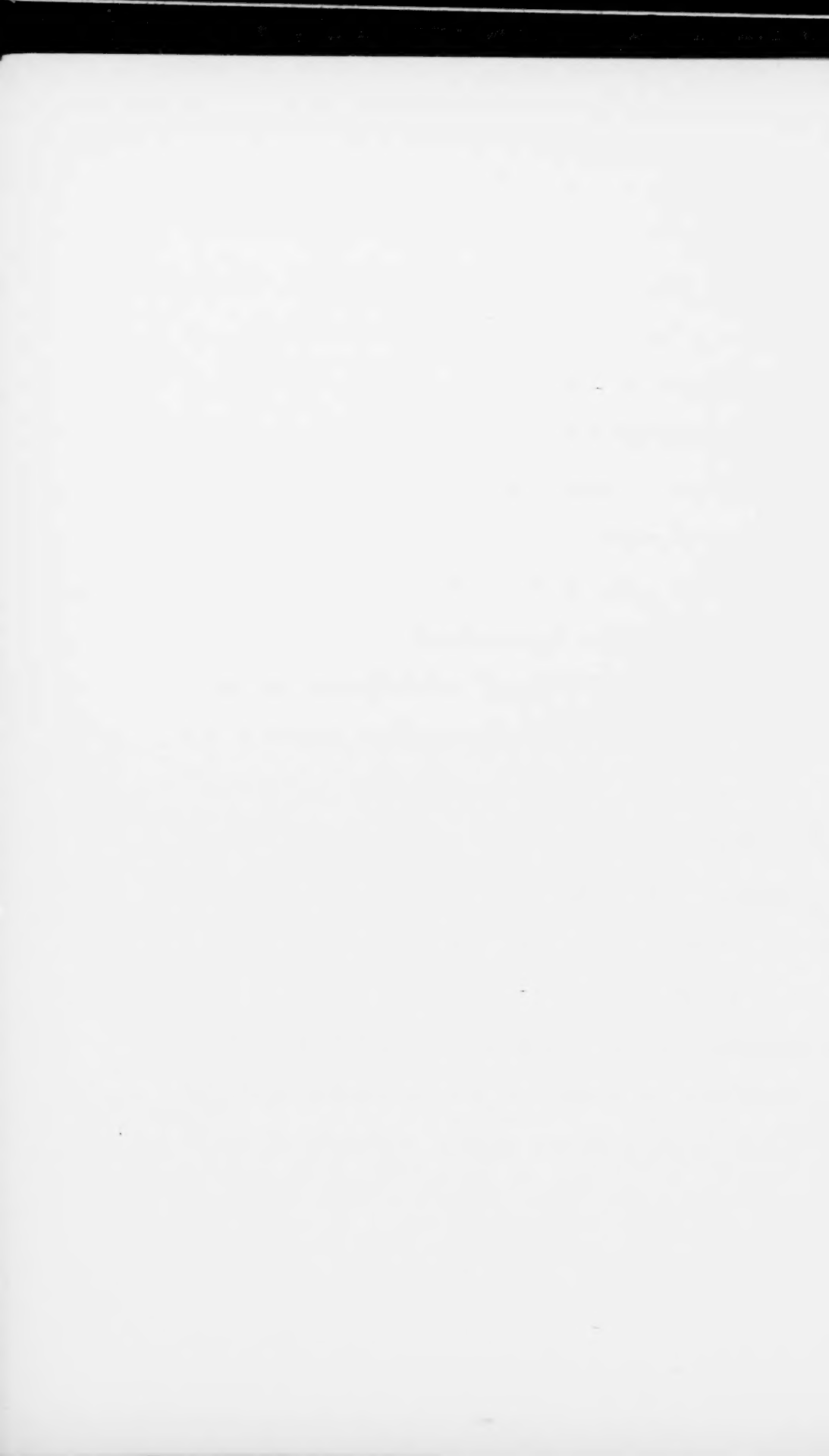
This Honorable Court has jurisdiction to consider this Petition for Writ of Certiorari pursuant to 28 U.S.C. Section 1254(1) and Rule 17.1(c), Supreme Court Rules.

The decision of the United States Court of Appeals, Second Circuit, rendered on December 1, 1987, (App. B) and the denial of the Petition of Rehearing and for En Banc Consideration by that Court on January 14, 1988, (App. C), decided an important question of federal law which has not been, but should be, settled by this Court. The Petitioner filed for and received a 30-day extension of time in which to file this Petition.

The decision sought to be reviewed is the imposition of a sentence consisting



of consecutive periods of the maximum penalty for multiple violations of 21 U.S.C. Section 843(b), use of a communication facility to facilitate a cocaine conspiracy. This decision is of particular importance owing to the increased use of modern communications equipment in drug conspiracies, i.e., beepers, mobile telephones, call waiting, call forwarding and conference calls--which can increase the number of technical "communications," without further facilitating the underlying crime. The issue of what constitutes a facilitating communication under 21 U.S.C. Section 843(b), for the purpose of supporting a separate sentence, will continue to arise in prosecutions brought under this statute until the question is resolved by this Court. The issue of



sentencing is particularly complex where, as here, the crime being facilitated is a conspiracy which, by definition, requires agreement and hence communication between the co-conspirators.

The constitutional provisions involved in this case are the Fifth and Eighth Amendments to the United States Constitution:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. U.S. Const. Amend. V.

* * *



Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. U.S. Const. Amend. VIII.

The statutory provision involved is

21 U.S.C. Section 843(b):

It shall be unlawful for any person knowingly or intentionally to use any communication facility in committing or in causing or facilitating the commission of any act or acts constituting a felony under any provisions of this subchapter or subchapter II of this chapter. Each separate use of a communication facility shall be a separate offense under this subsection. For purposes of this subsection, the term "communication facility" means any and all public and private instrumentalities used or useful in the transmission of writing, signs, signals, pictures, or sounds of any kind and includes mail, telephone, wire, radio, and all other means of communication.



STATEMENT OF THE CASE

A. PRELIMINARY STATEMENT

In this Brief, the Petitioner, Jose Jaramillo-Montoya, will be referred to as "Jaramillo." The Respondent, the United States of America, will be referred to as "the Government."

References to the Record on Appeal are designated (A.) followed by the page numbers as assigned in the joint appendix filed by the parties in the Second Circuit appeal. The transcript of the trial conducted January 5-13, 1986, is referred to as "Tr." followed by the page number. References to the transcripts of the Fatico hearing and sentencing proceedings held on October 10, 1987 are referred to as "Supp.R." Documents attached in the appendices are identified

as "App." followed by an alphabetical designation.

B. COURSE OF PROCEEDINGS AND
DISPOSITION

Jaramillo was charged by Superseding Indictment with one count of conspiracy to distribute cocaine¹ and seven counts of using a telephone to facilitate the distribution of cocaine² in the case of United States v. Antonio Cuero-Flores, et al., Case No. 85-0489(s)(2)(E.D.N.Y).

Jaramillo was tried before a jury in the United States District Court for the Eastern District of New York presided over by the Honorable United States District Judge Thomas C. Platt. The jury found Jaramillo guilty of one count of participation in a cocaine distribution

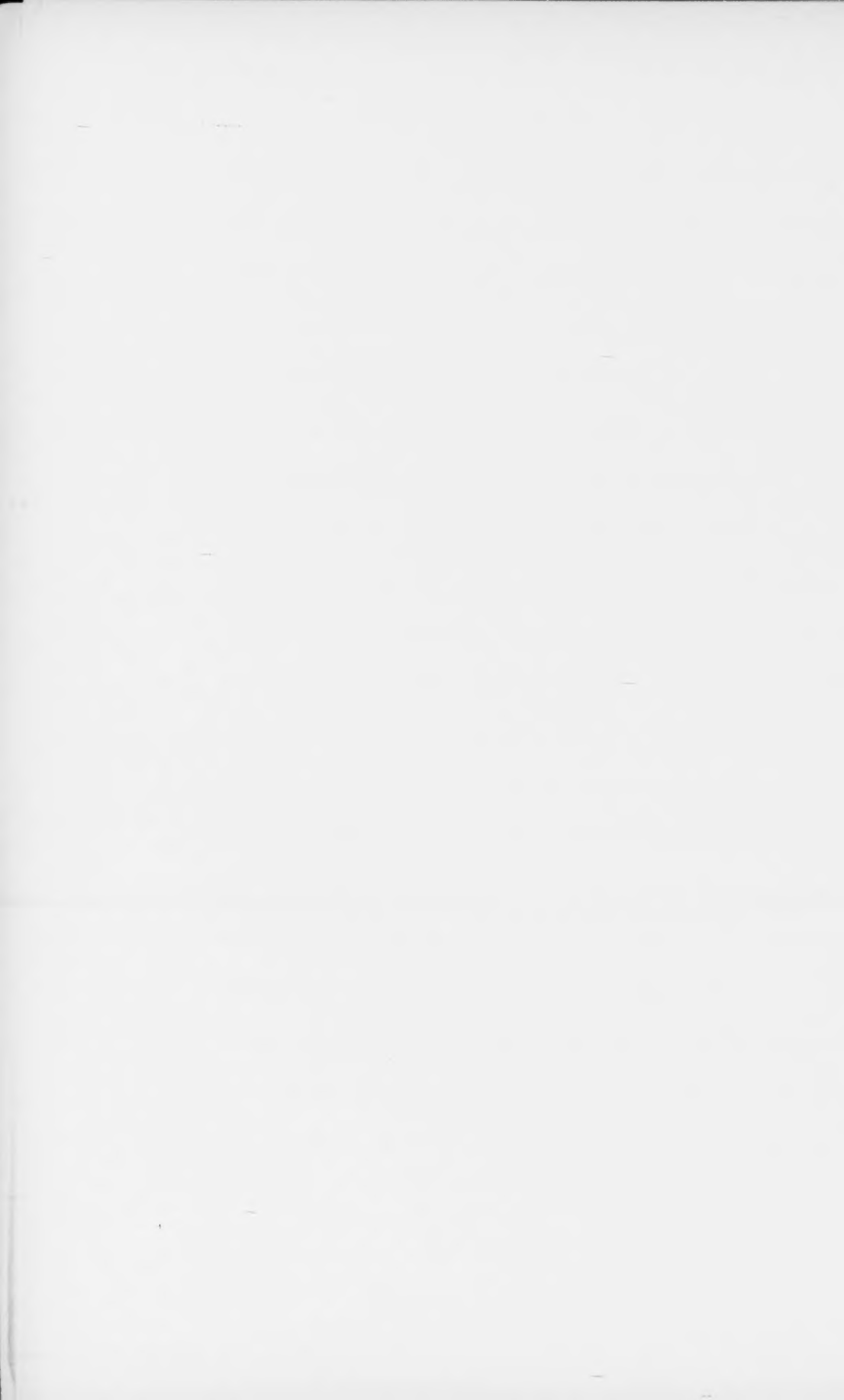
¹21 U.S.C. Section 846

²21 U.S.C. Section 843(b)

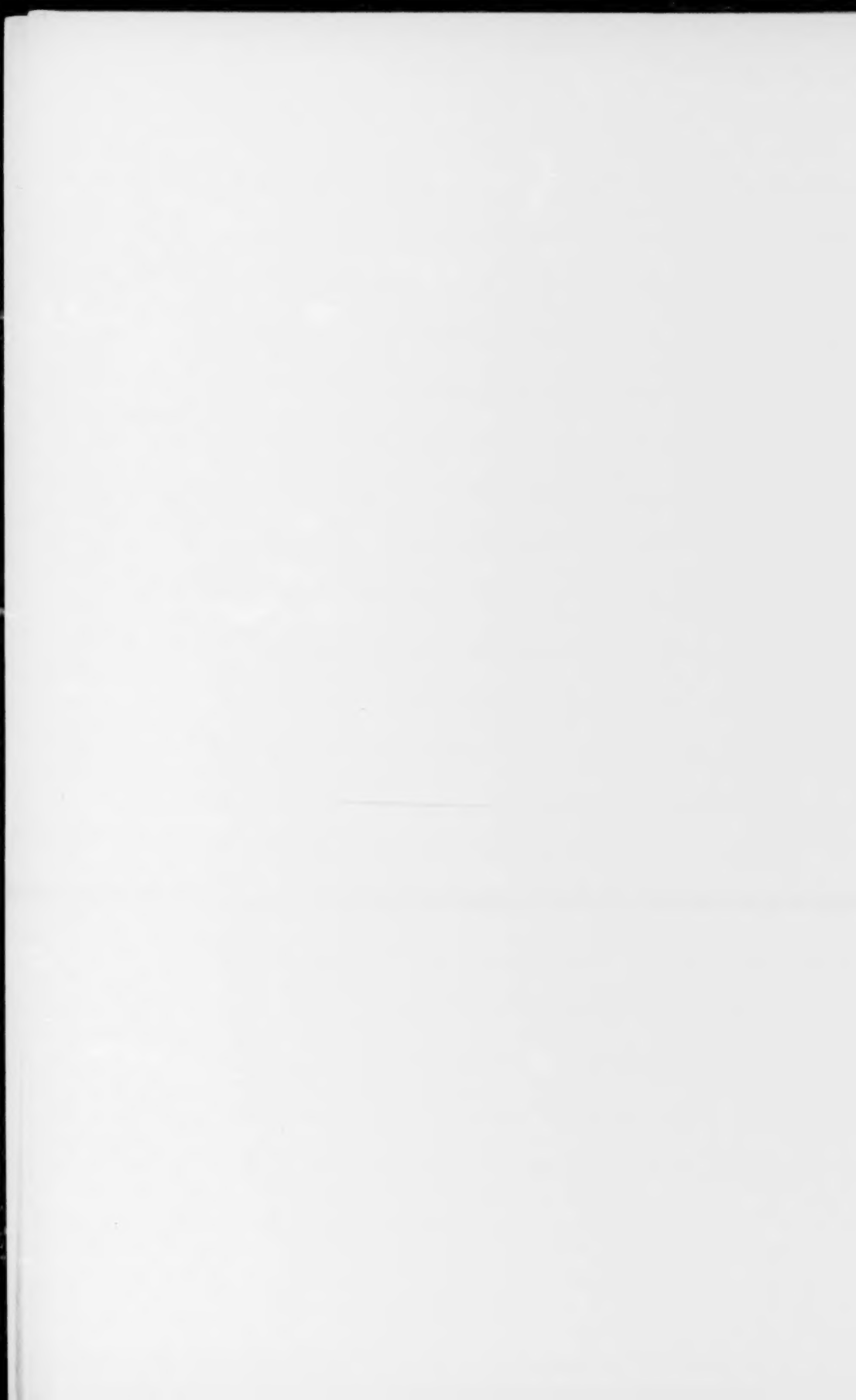


conspiracy in violation of 21 U.S.C. Section 846 (Count I) and seven counts of using the telephone to facilitate the distribution of cocaine in violation of 21 U.S.C. Section 843(b) (Counts 70 through 76). (App. A).

Jaramillo and eight other defendants had been charged jointly in a 96-count Indictment (A. 9). All of the defendants, including Jaramillo, were charged with conspiracy to distribute cocaine, and each defendant also was charged separately with a varying number of counts of use of the telephone to facilitate the distribution of cocaine. Jaramillo was charged with seven counts of facilitation. Several other defendants, excluding Jaramillo, were charged with the substantive crime of possession of cocaine with the intent to



distribute that cocaine. All eight of Jaramillo's co-defendants pleaded guilty prior to trial and were sentenced as follows: the lead defendant was charged in the conspiracy count, one substantive count, and 38 facilitation counts and received a sentence of 15 years on his plea of guilty to violation of 21 U.S.C. Section 841(a)(1); the second listed defendant was charged in the conspiracy count, one substantive count and eight facilitation counts and was sentenced to ten years imprisonment following his plea of guilty to violation of 21 U.S.C. Section 841(a)(1); the third named defendant was charged in the conspiracy count, two substantive counts and 19 facilitation counts and was sentenced to 12 years imprisonment following his plea of guilty to violation of 21 U.S.C.



Section 841(a)(1); the fourth named defendant was the Petitioner, Jaramillo; the fifth named defendant was charged in the conspiracy count and five telephone counts and was sentenced to ten years imprisonment following his plea of guilty to violation of Title 21 U.S.C. Section 841(a)(1); the sixth named defendant was charged in the conspiracy count and one facilitation count and was sentenced to five years probation following her plea of guilty of using the telephone to facilitate the distribution of cocaine in violation of 21 U.S.C. Section 843(b); the seventh named defendant was charged in the conspiracy count, one substantive count and two counts of facilitation and was sentenced to ten years imprisonment following his plea of guilty to violation of 21 U.S.C. Section 841(a)(1); the



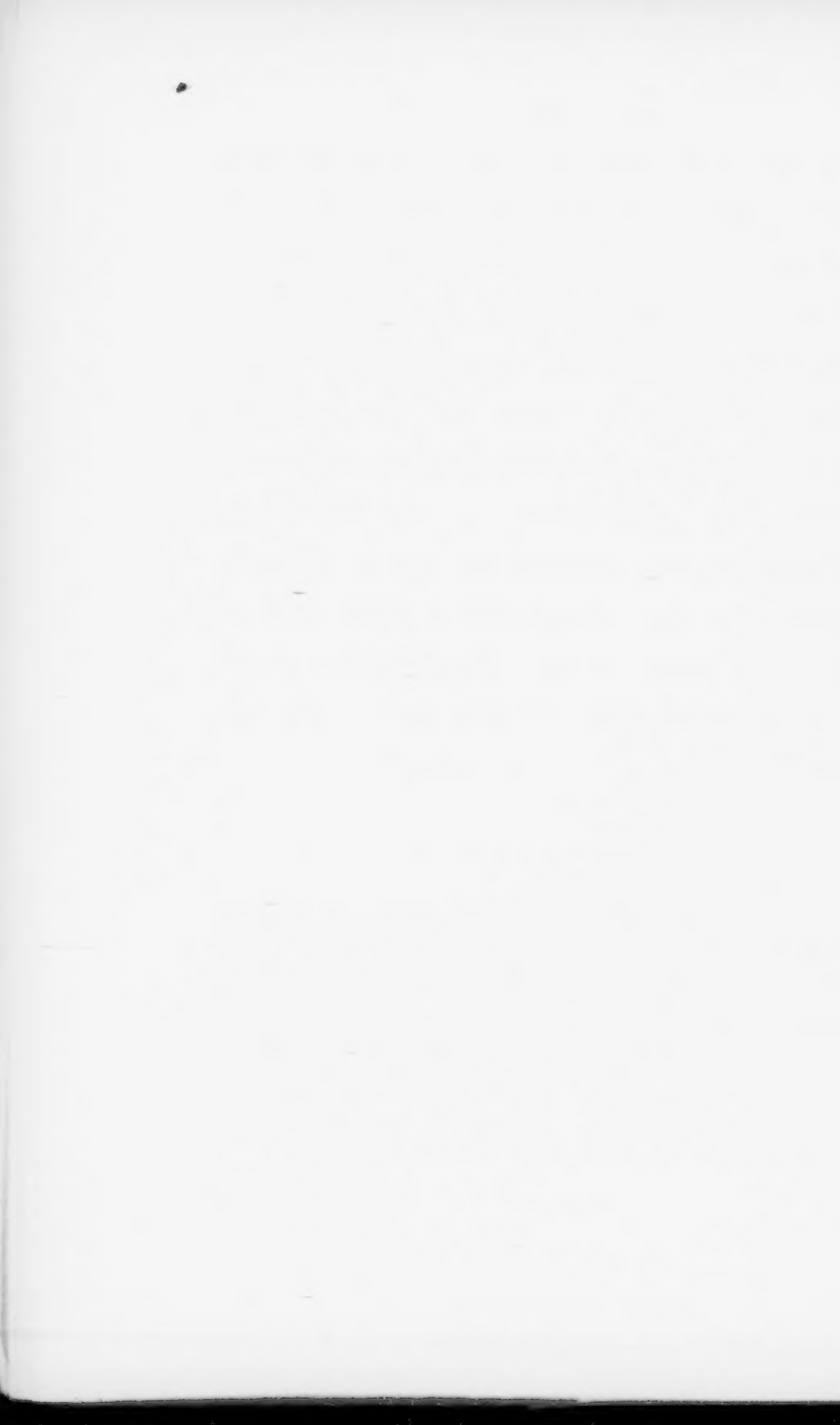
eighth named defendant was charged in the conspiracy count and 11 counts of facilitation and was sentenced to four years imprisonment following his plea of guilty to conspiracy to possess cocaine in violation of 21 U.S.C. Section 846; the last named defendant was charged in the conspiracy count, one substantive count and one count of facilitation and was sentenced to ten years imprisonment following his plea of guilty to violation of 21 U.S.C. Section 841(a)(1). (A. 52-58).

As set forth previously, the only defendant to exercise his right to trial, Jaramillo, was sentenced to 15 years imprisonment on the conspiracy count (21 U.S.C. Section 846), four years imprisonment on each of six counts of facilitation (21 U.S.C. Section



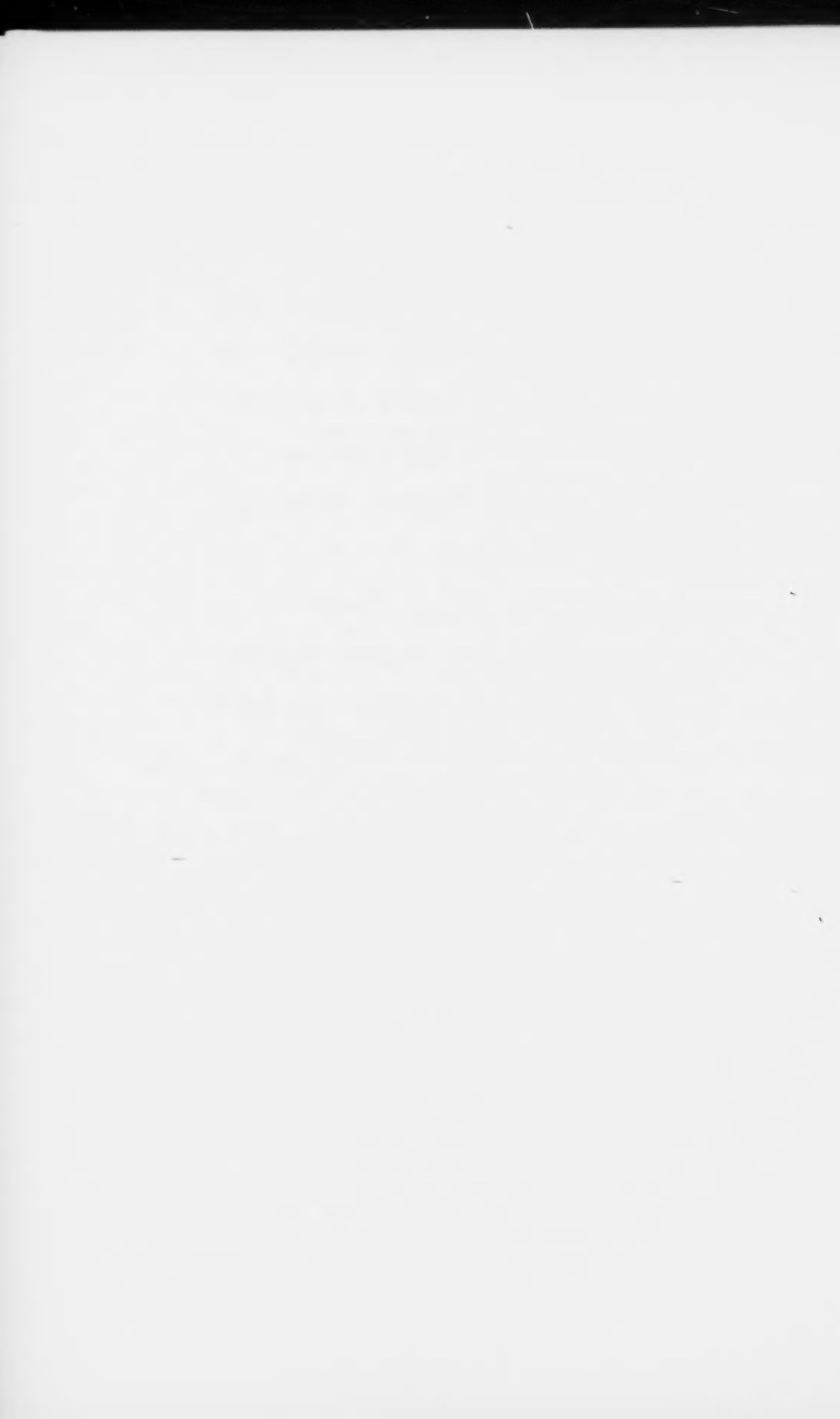
843(b)) and one four-year suspended term with imposition of a five-year period of probation on one facilitation count (21 U.S.C. Section 843(b)). All of those sentences were to run consecutive to each other for a total of 39 years of incarceration followed by a five-year term of probation. In addition, Jaramillo was ordered to pay a \$25,000 fine on the conspiracy count and a \$30,000 fine on each facilitation count for a total fine of \$235,000. (A. 58-59)³.

³This actually resulted in a more severe sentence than if Jaramillo had received the maximum penalty of four years on each telephone count. The parole guidelines remain the same whether the total imprisonment sentence is 39 or 44 years. However, the probationary period increases the total period for which Jaramillo will be under legal restraint by five additional years.



Jaramillo timely filed his Notice of Appeal to the United States Court of Appeals, Second Circuit on April 15, 1987. The Second Circuit Court of Appeals rendered its decision affirming the trial court's ruling and sentence on December 1, 1987 in the case of United States v. Jaramillo-Montoya, 834 F.2d 276 (2d Cir. 1987). (App. B). Jaramillo's Petition for Rehearing and Suggestion for Rehearing En Banc was denied by the Second Circuit on January 14, 1988. (App. C).

The Notice of Petition for Writ of Certiorari to this Court was filed on March 3, 1988. The Petitioner was granted a thirty-day extension in which to file this Petition.



STATEMENT OF FACTS

In the summer of 1985, Antonio "Tono" Cuero was a narcotics distributor, and an individual known as "Monina" was his source for cocaine. During the course of the Government's investigation, telephone calls were intercepted at Cuero's residence pursuant to a court order. Based upon those telephone calls, the Government concluded that Monina and Cuero had numerous discussions that summer in coded language regarding the price, quality and distribution of cocaine. Specifically, the Government introduced into evidence against Jaramillo, who the Government contends was "Monina," seven telephone calls spanning from July 26, 1985 through August 10, 1985 which formed the basis for the seven charges of facilitation in



violation of 21 U.S.C. Section 843(b) (Tr. 615-626) (App. D)⁴. In addition, on August 9, 1985, agents of the United States Drug Enforcement Administration witnessed a meeting and exchange of a package between Cuero and Monina, which was presumed by them to have been the distribution that had been discussed in these calls. (Tr. 172-177).

Following Jaramillo's conviction, a hearing was held pursuant to United States v. Fatico, 579 F.2d 707, on remand, 603 F.2d 1053 (2d Cir. 1979), cert. denied 444 U.S. 1073 (1980), after which the trial court made unfavorable factual findings. Judge Platt then

⁴For purposes only of this Petition, Jaramillo will agree to the Government's contention that he is "Monina," although for all other purposes, Jaramillo vigorously continues his protest against this identification.



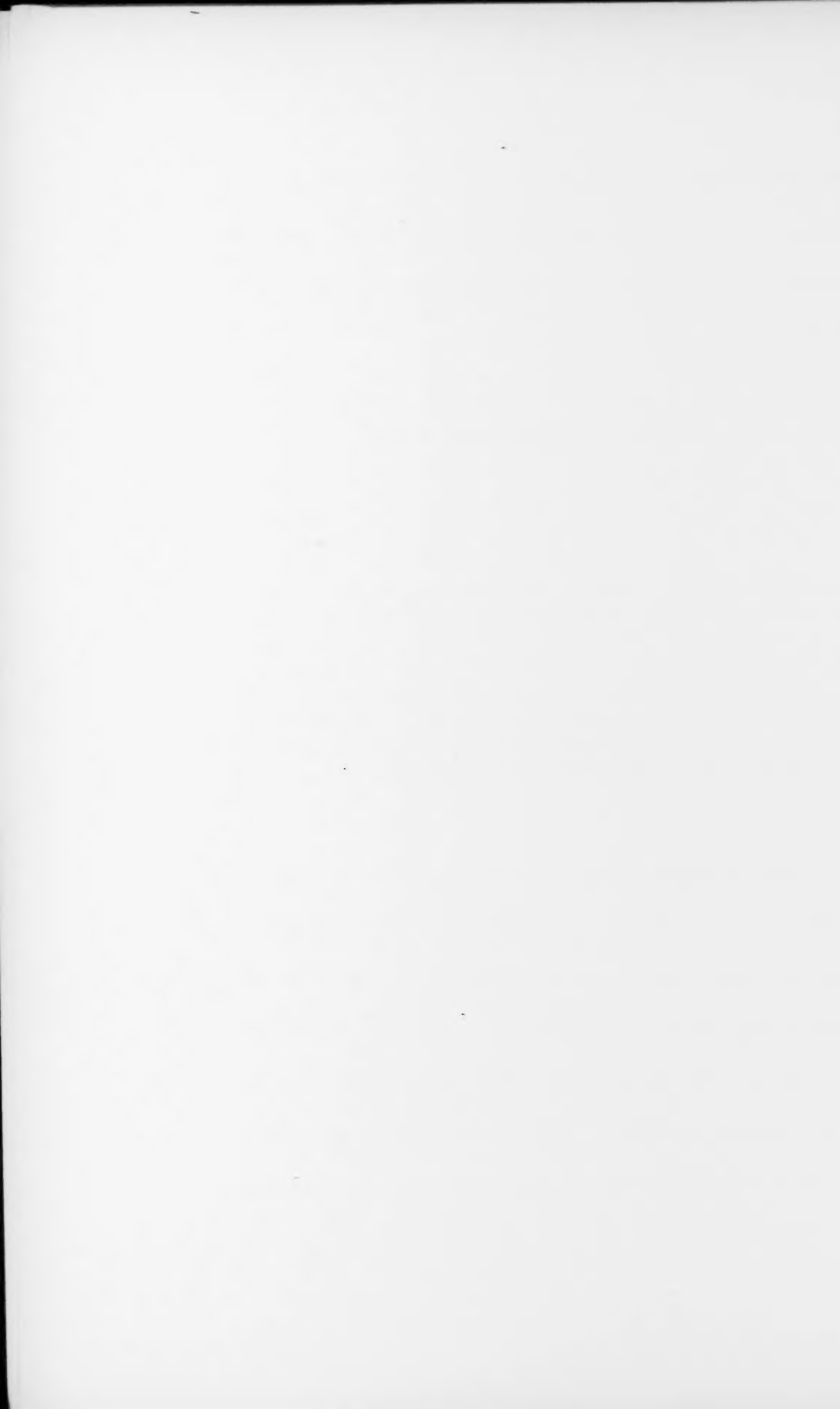
imposed the aforementioned sentence of 39 years of imprisonment, five years probation and a \$235,000 fine. (App. A). (Supp. R.).

ARGUMENT AND AUTHORITIES

I

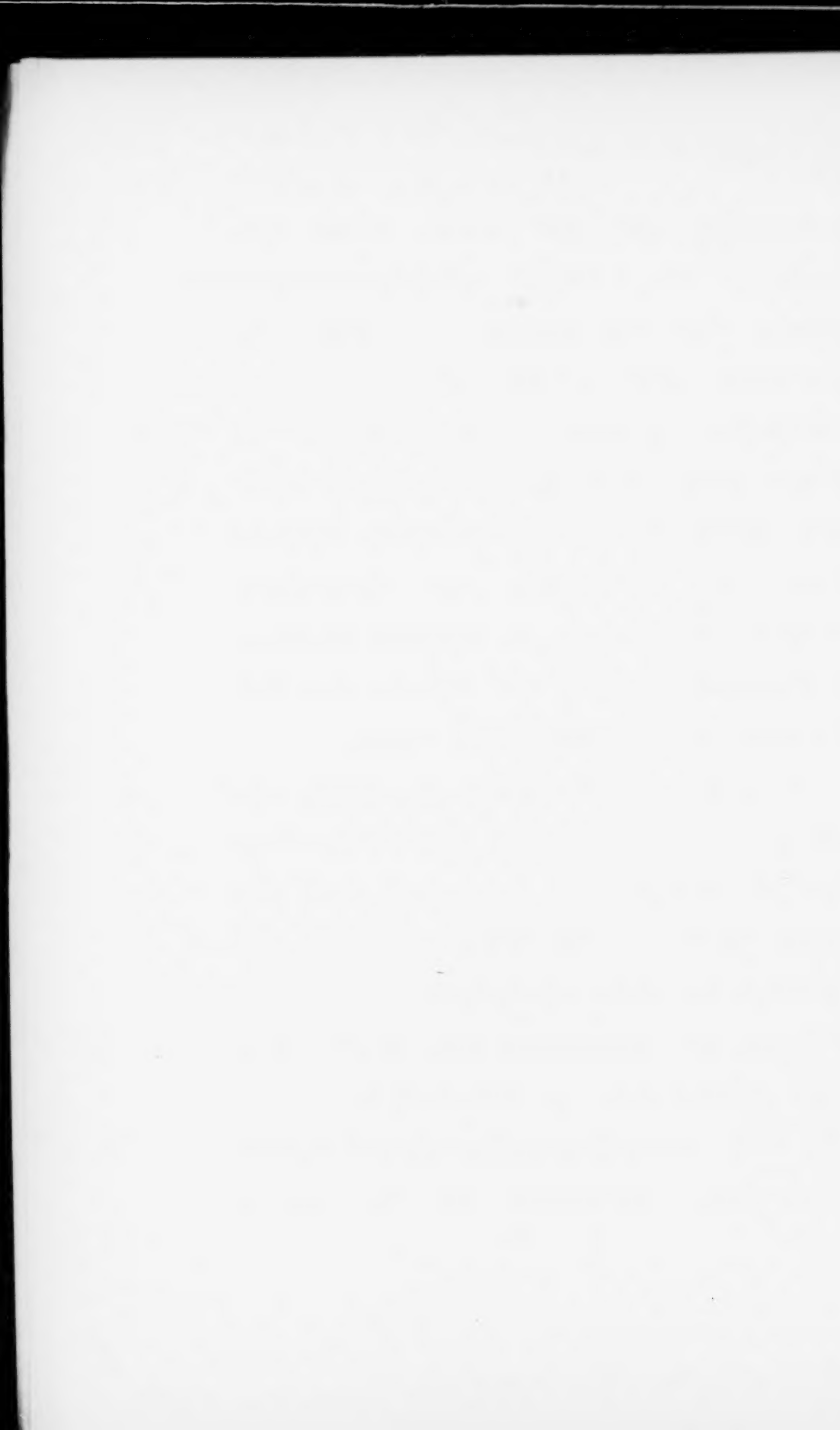
THE TRIAL COURT'S IMPOSITION OF CONSECUTIVE SENTENCES AMOUNTING TO A TERM OF THIRTY-NINE YEARS IMPRISONMENT PLUS FIVE YEARS PROBATION WAS SO DISPROPORTIONATE THAT IT VIOLATES THE EIGHTH AMENDMENT PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT.

The staggering result to Jaramillo of Judge Platt's 39-year sentence aggravated by a five-year period of probation and a \$235,000 fine, is that not only is Jaramillo being sentenced so disproportionately both to the sentences of his co-defendants and to the sentences



nation-wide for the same acts, but Jaramillo is being sentenced more harshly for the manner in which he committed the crime than for the commission of the crime itself. In effect, although Jaramillo received a 15-year sentence of imprisonment for the crime of conspiracy to distribute cocaine, he received a 24-year sentence of imprisonment for the manner in which he conspired to commit that crime.

In the case of Solem v. Helm, 463 U.S. 277, 290-293 (1983), the Court noted that a "criminal sentence must be proportionate to the crime for which the defendant has been convicted." The Court in Solem, id, recognized that courts have broad discretion in imposing sentence, and that reviewing courts should "grant substantial deference to the broad



authority that legislatures necessarily possess in determining the types and limits of punishments for crimes...."

But, the Court in Solem, ibid, stated that "no penalty is per se Constitutional." Clearly, in that case, as in the case of United States v. Ortiz, 742 F.2d 712 (2d Cir.), cert. denied, 469 U.S. 1075 (1984), the Court made it clear that sentencing courts, as well as reviewing courts, should be guided by objective criteria, including (i) the gravity of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions. 463 U.S. at 290-291.

In the instant case, six of Jaramillo's co-defendants, including the

three lead defendants, were sentenced to periods of incarceration ranging from a maximum of 15 years imprisonment to a minimum of four years imprisonment following pleas of guilty to possession of cocaine with intent to distribute it in violation of 21 U.S.C. Section 841(a)(1). Another co-defendant received a four-year sentence following his plea of guilty to conspiracy to possess cocaine in violation of 21 U.S.C. Section 846, and one co-defendant was sentenced to five years probation following her plea of guilty to using the telephone to facilitate the distribution of cocaine in violation of 21 U.S.C. Section 843(b). Jaramillo and his co-defendants have a number of things in common: (1) all defendants were charged in the conspiracy count; (2) all



defendants were charged with use of the telephone to facilitate the distribution of cocaine; and (3) all defendants were sentenced by Judge Platt. Jaramillo and his co-defendants also have certain things not in common: (1) Jaramillo elected to exercise his right to a trial by a jury of his peers while Jaramillo's co-defendants elected to enter pleas of guilty to various charges, and (2) Jaramillo received a sentence of imprisonment which is 24 years longer than the sentence given to the lead defendant. In sum, Jaramillo has been sentenced to serve a period of imprisonment which is at least three times more severe than the sentence imposed on defendants who not only were at least as culpable as Jaramillo but, in some cases, more culpable than

Jaramillo in that the guilty pleas of some co-defendants constitute admissions to acts of distribution of cocaine.

After Jaramillo elected to proceed by jury trial in this case rather than by guilty plea and following his conviction, Jaramillo became the subject of a Fatico hearing at the time of sentencing. Clearly, as a result of that Fatico hearing, Judge Platt was able to make, and did make, factual findings regarding Jaramillo's prior illegal activities. However, Jaramillo argues he should not have been sentenced more harshly than his co-defendants where the gravity of the offenses for which Jaramillo was convicted largely is equal to or less than that of the offenses to which his co-defendants entered pleas of guilty. In addition, the trial transcript clearly



reflects that the lead defendants in this case had backgrounds at least as disturbing as Jaramillo's, and perhaps more disreputable in some instances, and yet those co-defendants suffered neither the necessity of being the subject of a Fatico hearing nor did those co-defendants receive an enhanced sentence.

It is interesting to note that, unlike other co-defendants who pleaded guilty, Jaramillo had no prior arrest record. Apparently, Judge Platt foundationed his 39-year sentence of Jaramillo on Jaramillo's conviction on the charges before the Court in addition to the information presented at the Fatico hearing -- a hearing which was not strictly subject to rules of procedure and/or evidence and which was presented largely by use of hearsay testimony or by

testimony of confidential informers or persons who otherwise would benefit from their cooperation with the Government. 18 U.S.C. Section 3577; Federal Rules of Evidence, Section 1101(d)(3); Roberts v. United States, 445 U.S. 552 (1980); United States v. Tucker, 404 U.S. 443 (1972); United States v. Fatico, supra.

It is clear from the record that, in light of the information provided to Judge Platt at the time of the Fatico hearing, Jaramillo's sentence was enhanced and he was sentenced far more severely than any of his co-defendants and more harshly even than other persons convicted of similar offenses across the nation. Jaramillo's hearing was effected by all of the problems and prejudices attendant to such a hearing. Jaramillo was placed in the untenable position of



having to protect himself against prosecutorial advantages and was weaponless and bereft of ammunition. Jaramillo found himself unable to defend against character assassination, against testimony given only by agent hearsay, but also against information which appeared highly persuasive when, in fact, much of the information merely was repetitive of the same story. In addition, Jaramillo was unable to defend against testimony regarding crimes for which he had never been convicted, against the reputation of and his association with his friends, and against his reputation in the law enforcement community. Further, Jaramillo was in the untenable position of trying to rebut his characterization by the Government as a leading figure in this conspiracy when,



in light of the co-defendant's pleas, Jaramillo was the only figure remaining to bear the brunt of the Government's prosecution.

Clearly, Jaramillo's more severe sentence was not justified in light of all of the factors considered by the Court. For example, although the evidence at trial, viewed in the light most favorable to the Government, suggests that Jaramillo was at a high level of the narcotics organization, other co-defendants were at both higher and lower levels than Jaramillo and, seemingly regardless of their level of culpability, received less severe sentences than did Jaramillo. In addition, although it is proper for the sentencing court to give some consideration at the time of sentencing

to persons who admit their guilt, it is improper, as it appears in the instant case, for a court to penalize an individual who elects to exercise his right to a trial by a jury of his peers. Finally, although the evidence at trial and at the Fatico hearing reveals that the enterprise was a violent one and that weapons, ammunition and a bullet-proof vest were recovered from Cuero's residence and the Whitestone stash pad (Tr. 52, 61, 65, 75) and that Jaramillo was shot in the head while in Diaz' car, (Tr. 98, 105, 106, 108, 109), such violence cannot be assigned to Jaramillo, but rather it appears that Jaramillo was a victim rather than a perpetrator of violence.

An examination of the Sentences Imposed Chart for the United States

District Courts commencing July 1, 1984 and ending June 30, 1986, which was relied upon by the Court in United States v. Ortiz, supra, is instructive in this case as the statistics in the current chart demonstrate the disparity between Jaramillo's sentence and the sentence of other similarly convicted persons. Jaramillo notes that the individual sentences analyzed include all sentences imposed on one defendant in one case and are listed under the most serious convictions with no distinction made between a sentence imposed for one count or for multiple counts. Consecutive counts also are added together and represented by a total figure. This data demonstrates that of 405 defendants convicted for violation of 21 U.S.C. Section 843(b) in connection with cocaine

distribution, 202 (50%) defendants were imprisoned with a mean length of imprisonment of 34 months and a median of 30 months. Of the 202 persons convicted of violation of 21 U.S.C., Section 843(b), 29 persons (14%) received a sentence of one year; 160 persons (79%) received a sentence of between two to five years imprisonment; 11 (5%) persons received a sentence of between six to nine years imprisonment and only two persons (.9%) received a ten year sentence. Jaramillo respectfully suggests two things: (1) the statistics indicate either that the Government failed to charge some 160 defendants with multiple telephone counts (which is highly unlikely) or that, as to these defendants, courts generally have not sentenced defendants consecutively on



multiple telephone counts charged separately; and (2) that Jaramillo's 24-year sentence on the telephone counts is far, far greater than the national average sentence.

DEFENDANTS SENTENCED IN THE
UNITED STATES DISTRICT COURTS
FOR VIOLATION OF
21 U.S.C. SECTION 843(b)
July 1, 1984 - June 30, 1986

<u>No. of Defendants</u>	<u>Years of Imprisonment*</u>
29	1 year or less
160	2 - 5 years
11	6 - 9 years
2	10 years
0	11 years or more
Jaramillo	24 years

*Average term of imprisonment is 4.2 years.

Jaramillo submits that courts across the nation repeatedly have imposed heavy



sentences for violations of United States narcotics laws and have given long sentences, even in cases involving less severe crimes, where warranted by the surrounding circumstances, such as cases involving conviction for trafficking in heroin. See Terrebonne v. Blackburn, 646 F.2d 997 (5th Cir.) (en banc), cert. denied, 450 U.S. 917 (1981); Salazar v. Estelle, 547 F.2d 1226 (5th Cir. 1977); United States v. Fiore, 467 F.2d 86 (2d Cir. 1972); and McWilliams v. United States, 394 F.2d 41 (8th Cir. 1968). With the exception of the case of Hutto v. Davis, 454 U.S. 370 (1982), such harsh sentences have been reserved primarily for defendants convicted in cases involving heroin trafficking or violation of the Continuing Criminal Enterprise statute, 21 U.S.C. Section

848. Interestingly, the Sentences Imposed Chart, supra, which covers the time period from July 1, 1984 through June 30, 1986, reveals that the average sentence for violation of 21 U.S.C. Section 848 is 14 years. The statistic is remarkable as, unlike in the instant case, the Continuing Criminal Enterprise statute requires proof of sustained criminal activity.

In evaluating all of the factors considered here, Jaramillo submits that his sentence is constitutionally improper under the Eighth Amendment to the United States Constitution, as well as in light of the Court's decisions in Solem v. Helm, supra, and in United States v. Ortiz, supra.

THE IMPOSITION OF CONSECUTIVE
MAXIMUM SENTENCES FOR MULTIPLE
REPEATED 21 U.S.C. SECTION 843(b)
OFFENSES VIOLATES THE
CONSTITUTIONAL PROHIBITIONS AGAINST
CRUEL AND UNUSUAL PUNISHMENT AND
DOUBLE JEOPARDY, WHERE THE
TELEPHONE CALLS TAKEN INDIVIDUALLY
DO NOT SEPARATELY FACILITATE THE
UNDERLYING CONSPIRACY

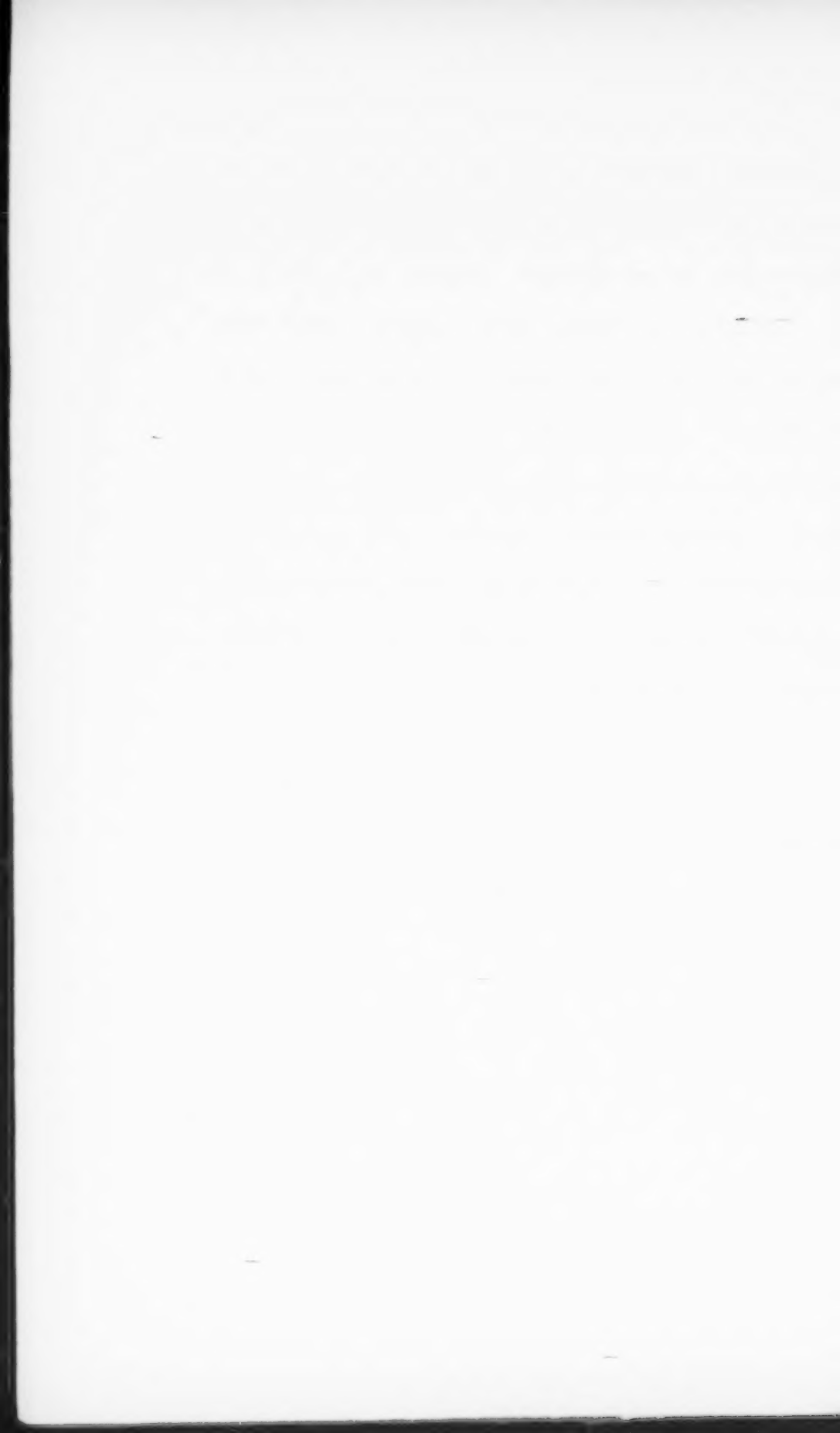
Jaramillo was convicted of seven counts of using a telephone to facilitate the distribution of cocaine in violation of 21 U.S.C. Section 843(b). The trial court imposed the maximum sentence of four years imprisonment for six of the telephone counts (Counts 70 through 75) and one five-year period of probation for the seventh count (Count 76). Each sentence was consecutive to the other telephone sentences and to the 15-year sentence of imprisonment imposed for the conspiracy count under 21 U.S.C. Sections 841(a)(1) and 846, resulting in

a total period of imprisonment of 39 years and a total period of legal restraint of 44 years. (App. A).

Jaramillo does not argue that the separate convictions themselves are unlawful.⁵ However, the imposition of separate, consecutive sentences in this case constitutes cruel and unusual punishment and violates the prohibition against double jeopardy. U.S. Const. Amend. V and VIII.

⁵21 U.S.C. Section 843(b) provides, in pertinent part:

... Each separate use of a communication facility shall be a separate offense under this subsection....



Jaramillo's argument is not unique. Circuit courts have long recognized that there are offenses for which the defendant may receive multiple convictions but only one sentence. This is particularly common in multi-count drug conspiracy indictments such as this one. See e.g., United States v. Touw, 769 F.2d 571 (9th Cir. 1985) (conspiracy and attempt); United States v. Gomberg, 715 F.2d 843 (3d Cir. 1983), cert. denied sub nom, Spielvogel v. United States, 465 U.S. 1078 (1984) (continuing criminal enterprise and conspiracy); United States v. Gomez, 593 F.2d 210 (3d Cir.), cert. denied, 441 U.S. 948 (1979) (possession with intent to distribute and actual distribution).

As was previously discussed, the sentence imposed violates the Eighth

Amendment by reason of its gross disproportionality when compared to sentences imposed in equivalent cases. Solem v. Helm, supra. It further constitutes cruel and unusual punishment because the multiple consecutive sentences are grossly disproportionate to the crime committed -- the mere facilitation of the underlying conspiracy.⁶

Jaramillo contends that not only was his sentence improper as a result of the consecutive sentences imposed on the telephone counts, but Jaramillo also would point out to this Honorable Court that to affirm the sentence would be, in effect, to give unfettered power to the

⁶Unlike a number of his co-defendants, Jaramillo was charged only with the conspiracy and the telephone calls, not any substantive drug offense. (A. 9).



Government in the manner in which they are able to influence a court at the time of sentencing. To permit unbridled discretion as to sentencing on telephone counts could easily result in outrageous and unjust results that certainly could not have been intended by Congress when Congress permitted the Government to charge use of the telephone as separate offenses.

Jaramillo suggests that the very nature of a conspiracy agreement between individuals requires communication. Communication is essential in that in order to meet the elements required to prove a conspiracy, all conspirators must communicate in some way, most often verbally, with each other. Although there are numerous cases which deal with the propriety of the imposition of

consecutive sentences, Jaramillo's case is without precedence in that he asks this Court to consider whether consecutive sentences imposed following conviction of numerous acts of violation of 21 U.S.C. Section 843(b) which may be considered to be continuing conversations over a short period of time resulting in the culmination of the underlying charged crime, is constitutionally improper.

In Simpson v. United States, 435 U.S. 6, 11 n.5 (1978), the Court explained that the double jeopardy clause protects against multiple punishments for the same offense as well as prohibits multiple prosecutions for the same criminal act. In Brown v. Ohio, 432 U.S. 161, 169 (1977), this Court further explained that:

the Double Jeopardy Clause is not such a fragile guarantee that... its limitation [can be avoided] by the simple expedient of dividing a single crime into a series of temporal or spatial units.

In this case, six of the calls were made two each day on July 26, July 27 and July 30, 1985. The seventh call was made on August 10, 1985. (A. 9). The calls were short in duration, averaging one to two minutes apiece. In each instance, the participants in the conversations were the same two people-- Jaramillo and Antonio "Tono" Cuero. The Government's theory was that each call contained references to and facilitated a single transaction -- the sale and delivery of cocaine which occurred on August 9, 1985. See, Statement of Facts, supra and App. D.

Specifically, the telephone calls charged in the Indictment and the Government's analyses of these calls is as follows:

1. Count 70. This is a three-minute telephone call lasting from 6:00 P.M. to 6:03 P.M. on July 26, 1985, where according to the Government, Cuero and Jaramillo discussed pre-cut cocaine of good quality. (App. D).

2. Count 71. This call was a two-minute conversation beginning at 6:18 P.M. (approximately 15 minutes after the aforementioned telephone call) on July 26, 1985, where according to the Government, Jaramillo and Cuero discussed the quality of pre-cut cocaine. (App. D).

3. Count 72. This two-minute call occurred the following day (July 27)

where, according to the Government, Jaramillo and Cuero discussed pre-cut cocaine and the quantity and quality of cocaine which had been delivered. (App. D).

4. Count 73. This one-minute conversation also occurred on July 27, 1985, where, according to the Government, Jaramillo and Cuero discussed arrangements to deliver cocaine and the inadvisability of leaving the cocaine somewhere. (App. D).

5. Count 74. Three days following the previous call, Jaramillo and Cuero had a one-minute conversation where, according to the Government, they "again" spoke regarding negotiations which would affect the delivery of cocaine. (App. D).

6. Count 75. Approximately four and one-half hours following the previous call on, Jaramillo and Cuero spoke during a two-minute follow-up call to see how the customers liked the quality of cocaine. (App. D).

7. Count 76. This thirty-second conversation between Jaramillo and Cuero occurred on August 10, 1985 where, according to the Government, they discussed the quality of cocaine which had been delivered and how fast it had moved to the customer. (App. D).

Taking the position most favorable to the Government and based upon the Government's analyses of these telephone calls, Jaramillo contends that his consecutive sentence clearly is improper as each call truly constituted a continuing or follow-up conversation to



the prior conversation: (1) each conversation discussed the quality of cocaine and/or delivery of that cocaine; (2) each conversation was commenced by a telephone call from Jaramillo to Cuero and, but for other persons answering the telephone and giving the call to Cuero, only Jaramillo and Cuero were parties to the conversation; and (3) the very temporal proximity of each call reflects the continuing nature of the communications. In addition, there is no reference, either in the transcripts or in the Government's interpretation of those transcripts, to whether the conversations dealt with one cocaine transaction, multiple cocaine transactions or even whether the communications were discussions regarding the quality of cocaine that had comprised

past transactions not charged in the Indictment.

Title 21 U.S.C. Section 843(b), itself, does not authorize or even address the imposition of consecutive sentences in a case such as this, where the resulting punishment for the facilitating phone calls is greater than that imposed for the conspiracy itself. Neither the reported legislative history nor the four volumes of supporting materials, in which the Committee reports, debates and staff analyses of the statute are compiled, contain a single reference to the possibility that a trial court could multiply the sentence for the underlying offense by tacking on additional periods of imprisonment for each telephone call. 1970 U.S. Cong. & Admin. News Reports p. 4566.

While Congress established that each time the telephone is used, that act may be charged as a separate offense, and Congress made no exclusion which would preclude consecutive sentences for telephone calls made the same day, this does not mean that Congress intended that consecutive sentences be imposed whenever the Government elected to "pick apart" the conspiracy in such a way as to charge a defendant separately every time his hand lifted the telephone receiver from its cradle. As the Court said in Solem v. Helm, supra at 290, "no penalty is per se Constitutional." Similarly, Jaramillo contends that no penalty is per se proper, absent specific legislative intent, simply because Congress failed to exclude the preclusion of consecutive sentences for telephone calls charged

separately but which, in substance, were merely a continuation of a conversation culminating in the completion of the substantive crime charged to the defendant.

Clearly, a court may subject the sentencing process to very careful scrutiny. United States v. Serhant, 740 F.2d 548 (7th Cir. 1984). In some cases, this scrutiny is warranted where, as here, a sentence is so disproportionate to either the substance of the crime and/or to the background of the defendant that the sentence, in effect, is unconstitutional.

The reported circuit court cases which have arisen under 21 U.S.C. Section 843(b), have not separately charged, much less separately punished, defendants for multiple telephone calls



made on the same day. See, United States v. Rodriguez, 546 F.2d 302 (9th Cir. 1976).⁷ In Rodriguez, the record reveals that there were, in fact, multiple telephone conversations between the same participants on the same day. These calls were charged and punished as only one count. Id. at 305.⁸

In Andrews v. United States, 817 F.2d 1277, 1281 (7th Cir.), cert. denied, ____ U.S. ____, 108 S.Ct. 166 (1987), the Seventh Circuit held that consecutive sentences for Section 843(b)

⁷The opinion does not reveal the specifics of the sentences imposed for the calls that were charged and resulted in convictions.

⁸The Government did not charge Jaramillo for every call it monitored. The reason for this decision is clear in one case -- the Government admitted that the call was not transcribed until after the trial already had begun. (Tr. 518-519).



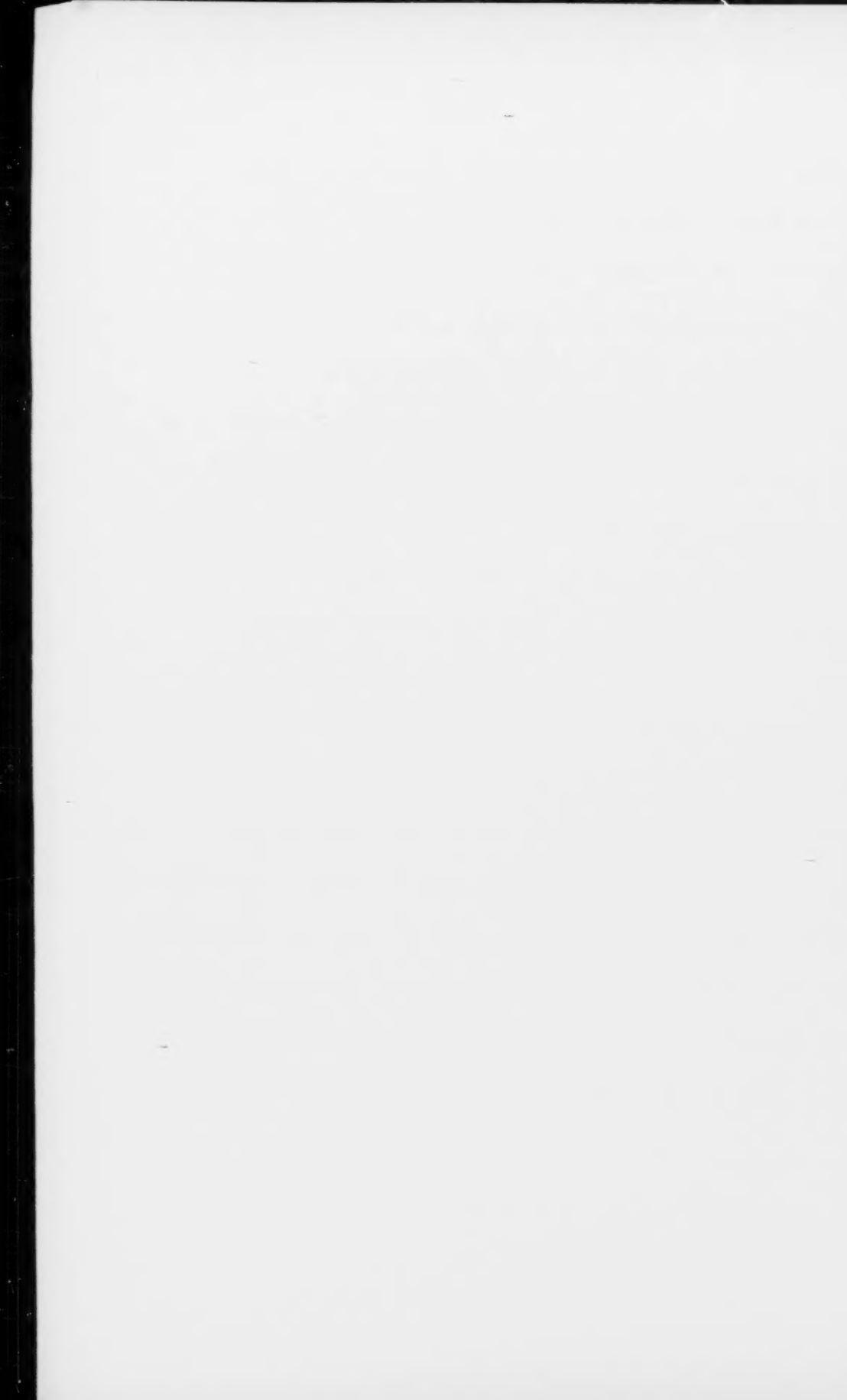
telephone calls are permissible under Blockburger v. United States, 284 U.S. 299 (1932), provided that each call requires proof of a fact that the others do not and that each call facilitates the drug distribution.⁹ The mere fact that the calls were placed at different times does not satisfy the Blockburger test as to proof of separate facts. Where, as here, the content of the calls is repetitious and cumulative separate sentences constitute multiple punishments for the same crime.

An analogous problem has arisen in perjury prosecutions. The courts have

⁹The defendant in Andrews fared better than Jaramillo at sentencing. Andrews received only three-year terms of imprisonment on each of his three counts. 817 F.2d at 1278. Jaramillo was sentenced to the maximum penalty of four years on each of six of his counts. (App. A).



drawn a distinction between the situation where the witness tells several different lies under oath and where he rewords and retells the same lie in response to repeated questioning. In the first case, the witness may be sentenced separately for each false statement. United States v. McComb, 744 F.2d 555 (7th Cir. 1984). But in the second situation, he can be punished only once. For the purpose of the Double Jeopardy Clause, it makes no difference that the lie was retold at different times during the course of the testimony or even that it may have been repeated before two different bodies -- it still cannot lawfully result in more than one punishment. Southers v. Veteran's Administration, 813 F.2d 1223, (Fed.



Cir. 1987); United States v. Williams, 552 F.2d 226 (8th Cir. 1977).

When the rationale of the perjury cases is applied to this case, it becomes clear that the repeated use of the telephone in connection with a single drug distribution transaction can result in only one punishment where there is (1) an identity of the participants in each conversation, (2) an identity of the subject matter of each call, (3) a close temporal proximity of the calls, and where (4) each call does not separately and independently facilitate the distribution.

Government witness, agent Senecal, translated the calls from Spanish to English and testified at trial as to their content. He characterized the calls as being repetitive discussions of

the quality of their cocaine, expressions of Cuero's general uneasiness about the transaction, and a follow-up report after the cocaine had already been distributed and sold. (App. D). From the repetitive contents of the calls, it is clear that each call did not serve to facilitate the conspiracy. The majority of the calls consisted solely of rehashing previous discussions and did not serve to further the distribution plan in any way. Yet Jaramillo was sentenced for each call regardless of whether the call assisted the conspiracy at all.

At the sentencing hearing, the trial court made no factual findings on the issue of whether each of the seven calls separately and individually facilitated the conspiracy. The court imposed

consecutive sentences for each call without inquiry or explanation. (Supp. R. 58). By so doing, the trial court impermissibly imposed multiple consecutive punishment for what was merely the repetition of one continuing communication, which served to facilitate the underlying conspiracy only when examined in total, not when broken into its constituent parts -- the separate telephone calls.

CONCLUSION

WHEREFORE, based upon the foregoing authorities, Petitioner, Jose Javier Jaramillo-Montoya, respectfully requests that this Honorable Court accept jurisdiction over this matter, grant his Petition for Writ of Certiorari, address

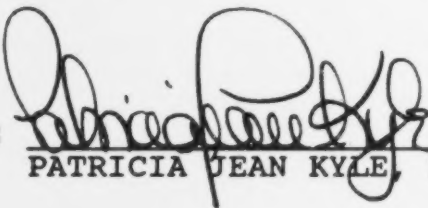


the questions presented herein for review, vacate the sentence imposed by the court below, and remand the case for further findings of fact and resentencing.

Respectfully submitted,

NURIK & KYLE, P.A.
Suite 203 - Grove Forest Plaza
2937 S.W. 27th Avenue
Miami, Florida 33133
(305) 441-2400

By:


PATRICIA JEAN KYLE, ESQ.



APP. A

U.S. GOVERNMENT PRINTING OFFICE
1966-496-383

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v.

JOSE JAVIER JARAMILLO-MONTOYA,

CASE NO. 85-489(S)(S)

JUDGMENT AND PROBATION COMMITMENT ORDER

Defendant appeared on April 10, 1987
With counsel:

Edward M. Rappaport, Esq.

FINDING & JUDGMENT:

GUILTY after jury trial on counts one,
seventy through seventy-six.

CONVICTED of violation of Title 21,
United States Code, Section 846 (count
one); & Title 21, United States Code,
Section 843(b) (counts seventy through
seventy-six).



SENTENCE OR PROBATION ORDER:

IT IS ORDERED AND ADJUDGED on count one that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a term of FIFTEEN (15) YEARS.

IT IS ORDERED AND ADJUDGED on counts seventy through seventy-five that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a term of FOUR (4) YEARS on each count. Such sentences of imprisonment on each of counts seventy through seventy-five shall run consecutively to each other and consecutively to the sentence of imprisonment imposed on count one, for a

total of THIRTY-NINE (39) YEARS in custody.

IT IS HEREBY ORDERED AND ADJUDGED on count seventy-six that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a term of FOUR (4) YEARS. Execution of sentence is suspended and the defendant placed on probation for a period of FIVE (5) YEARS. Such sentence on county seventy-six shall run consecutively to the sentences imposed on each of counts one, seventy through seventy-five.

CON'D

UNITED STATES DISTRICT COURT JUDGE
THOMAS PLATT (signed)



UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

v.

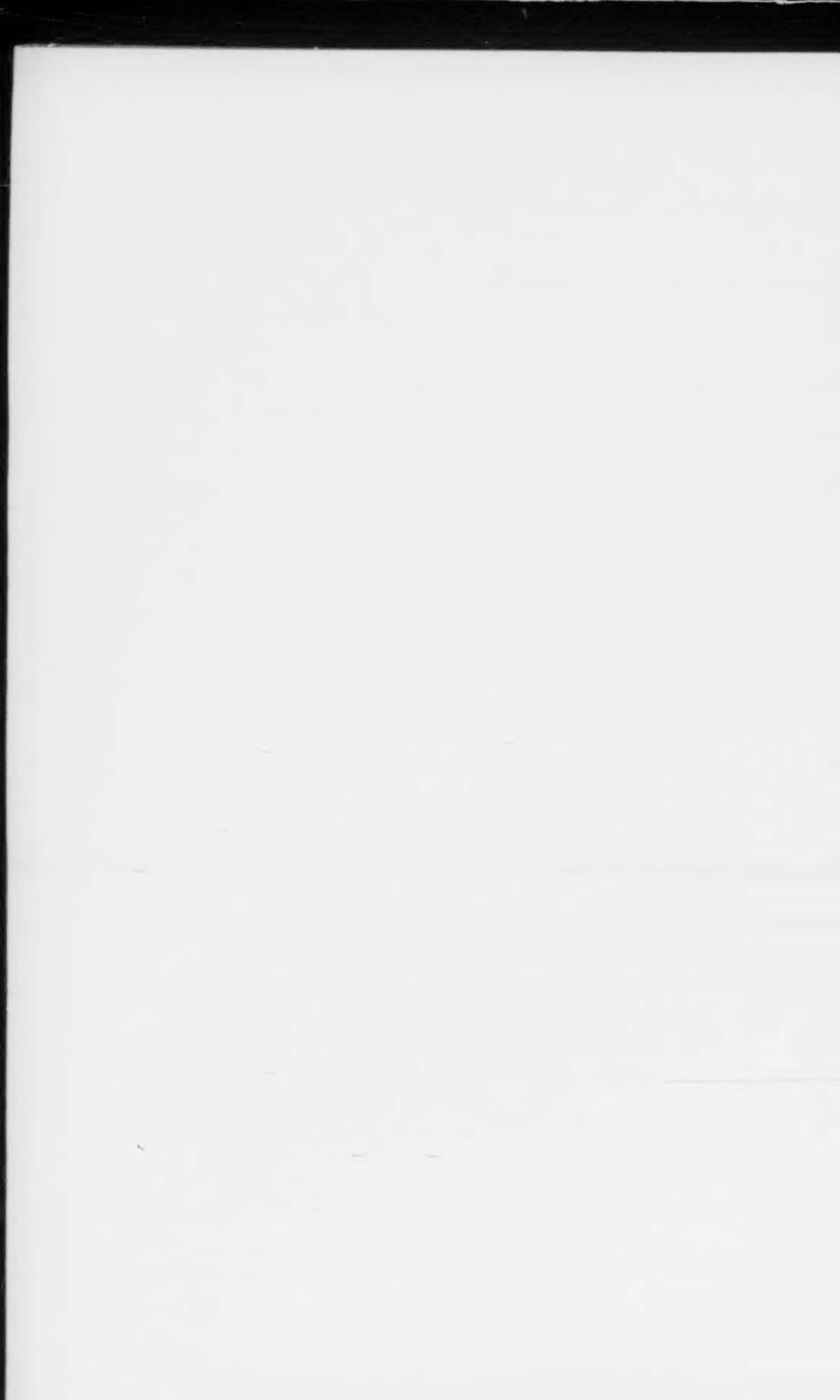
JOSE JAVIER JARAMILLO-MONTOYA

CONT'D

CR 85-489(S)(S)

Defendant shall pay a fine to the United States of America in the amount of TWENTY-FIVE THOUSAND DOLLARS (\$25,000.00) on count one, and THIRTY THOUSAND DOLLARS (\$30,000.00) on each of counts seventy through seventy-six for a total fine of TWO HUNDRED THIRTY-FIVE THOUSAND DOLLARS (\$235,000.00).

On motion of the United States Attorney by Assistant U.S. Attorney Patricia Pileggi, the underlying indictment CR 86-178 is ordered DISMISSED.



APP. B

UNITED STATES OF AMERICA, Appellee,

v.

Jose Javier
JARAMILLO-MONTOYA, Appellant.

No. 136, Docket 87-1197.

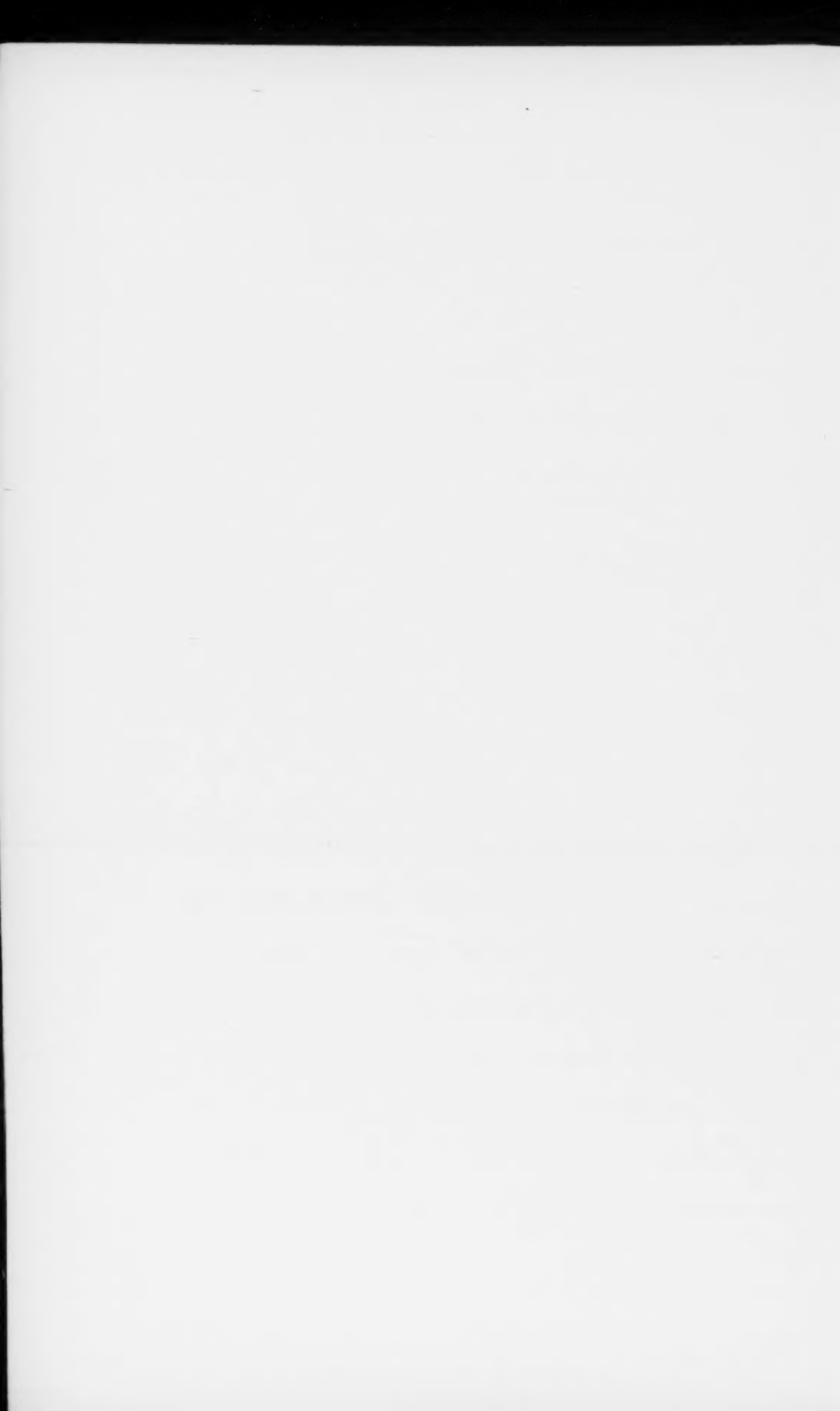
United States Court of Appeals,
Second Circuit.

Argued Sept. 23, 1987.
Decided Dec. 1, 1987.

Before LUMBARD, OAKES, and
KEARSE, Circuit Judges.

OAKES, Circuit Judge:

This appeal involves two questions: whether an address book containing the appellant's name was properly admitted either as a coconspirator's statement under Fed.R.Evid. 801(d)(2)(E) or under the residual hearsay exception, Fed.R.Evid. 804(b)(5), and whether a sentence totaling thirty-nine years'



imprisonment was so disproportionate as to be cruel and unusual.

Jose Javier Jaramillo-Montoya and eight others were charged with conspiracy to distribute cocaine, in violation of 21 U.S.C. Sections 841(a)(1), 846, and with using a telephone to facilitate the distribution of cocaine, in violation of 21 U.S.C. Sections 841(a)(1), 843(b). The codefendants pleaded guilty and received sentences ranging from five years' probation to twelve years' imprisonment. After a one-week trial before Judge Thomas C. Platt, United States District Court for the Eastern District of New York, Jaramillo was convicted of all charges, one count of conspiracy and seven telephone counts. Judge Platt sentenced him to fifteen years' imprisonment on the conspiracy count and four years on each telephone



count. Judge Platt suspended one four-year term, substituted a five-year term of probation, and held that the remaining sentences would run consecutively for a total of thirty-nine years' imprisonment. He also ordered Jaramillo to pay a \$25,000 fine on the conspiracy count and \$30,000 on each telephone count, for a total fine of \$235,000.

In the summer of 1985, a person known as "Monina" supplied large quantities of cocaine to Antonio Cuero-Flores, a wholesale-level narcotics distributor. Telephone calls intercepted at Cuero's residence revealed that when Cuero needed cocaine he would call Monina at beeper number (212) 812-1260 and Monina would then return the call. During the summer of 1985 Cuero and Monina used this method at least sixteen times to discuss in code the price, quality, and distribution of



cocaine. Monina returned five of these calls from a mobile telephone in a 1985 Pontiac Grand Prix. Altogether there were thirty-two telephone calls between Cuero's residence and the Grand Prix between June 2 and August 9, 1985.

[NOTE: Those portions of the opinion which deal with issues and facts that are not relevant to this Petition have been omitted. See full text at 834 F.2d 276.]

Jaramillo also argues that the imposition of consecutive sentences was so disproportionate as to violate the Eighth Amendment prohibition against cruel and unusual punishment. See Solem v. Helm, 463 U.S. 277, 290-93, 103 S.Ct. 3001, 3009-11, 77 L.Ed.2d 637 (1983); United States v. Ortiz, 742 F.2d 712 (2d Cir.), cert. denied, 469 U.S. 1075, 105 S.Ct. 573, 83 L.Ed.2d 513 (1984). The



trial court imposed a sentence of twenty-four years for six telephone calls, made two each day, on July 26, July 27, and July 30. Under 21 U.S.C. Section 843(b), each telephone call is a separate offense punishable by a sentence of four years' imprisonment. The trial court ordered that the twenty-four year sentence for the telephone calls run consecutively to the fifteen-year term imposed on the conspiracy count.

This case does not contain the "extraordinary set of circumstances" that renders the imposition of consecutive sentences unconstitutional. See United States v. Golomb, 811 F.2d 787, 790-91 (2d Cir.1987). Jaramillo was the central figure in this cocaine conspiracy. He was a major supplier of cocaine to wholesale distributors. He has never demonstrated remorse for his actions.



Rather, while awaiting trial, Jaramillo bragged to other prisoners that he intended to continue his cocaine operations. We have repeatedly upheld heavy sentences for narcotics offenders. Id.; Ortiz, 742 F.2d at 717; Cunningham v. Henderson, 725 F.2d 32, 36 (2d Cir.1984). Moreover, under 18 U.S.C. Section 4205(a) (1982); 28 C.F.R. Section 2.2(a) (1986), Jaramillo is statutorily eligible for parole after serving one-third of his term, or thirteen years, a matter which may be taken into account when assessing the harshness of the penalty. Ortiz, 742 F.2d at 715.

Finally, Jaramillo argues that his sentence is much more severe than the sentences imposed upon his codefendants. They, however, pleaded guilty, a fact that Judge Platt could properly consider in sentencing them. See United States v.

Araujo, 539 F.2d 287, 292 (2d Cir.),
cert. denied, 429 U.S. 983, 97 S.Ct.
498, 50 L.Ed.2d 593 (1976). Jaramillo's
sentence thus was not so
disproportionate as to be cruel and
unusual punishment.

Judgment affirmed.

App. C

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the fourteenth day of January, one thousand nine hundred and eighty-eight

UNITED STATES OF AMERICA,

Appellee,

-v-

JOSE JAVIER JARAMILLO-MONTOYA,

Appellant.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel



for the defendant-appellant Jose Javier Jaramillo-Montoya,

Upon consideration by the panel that heard the appeal, it is

ORDERED that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

Elaine B. Goldsmith,
Clerk

Filed January 14, 1988



APP. D

TRIAL TRANSCRIPT EXCERPTS

NOTE: For the Court's convenience, the Petitioner has included the following verbatim excerpts of the trial testimony of Government witness Agent Senecal. The following are those portions of Agent Senecal's testimony which summarize the content of each telephone call which formed the basis of the Petitioner's convictions for 21 U.S.C. 843(b) violations and which give the Government's interpretation of their significance as drug-related conversations.

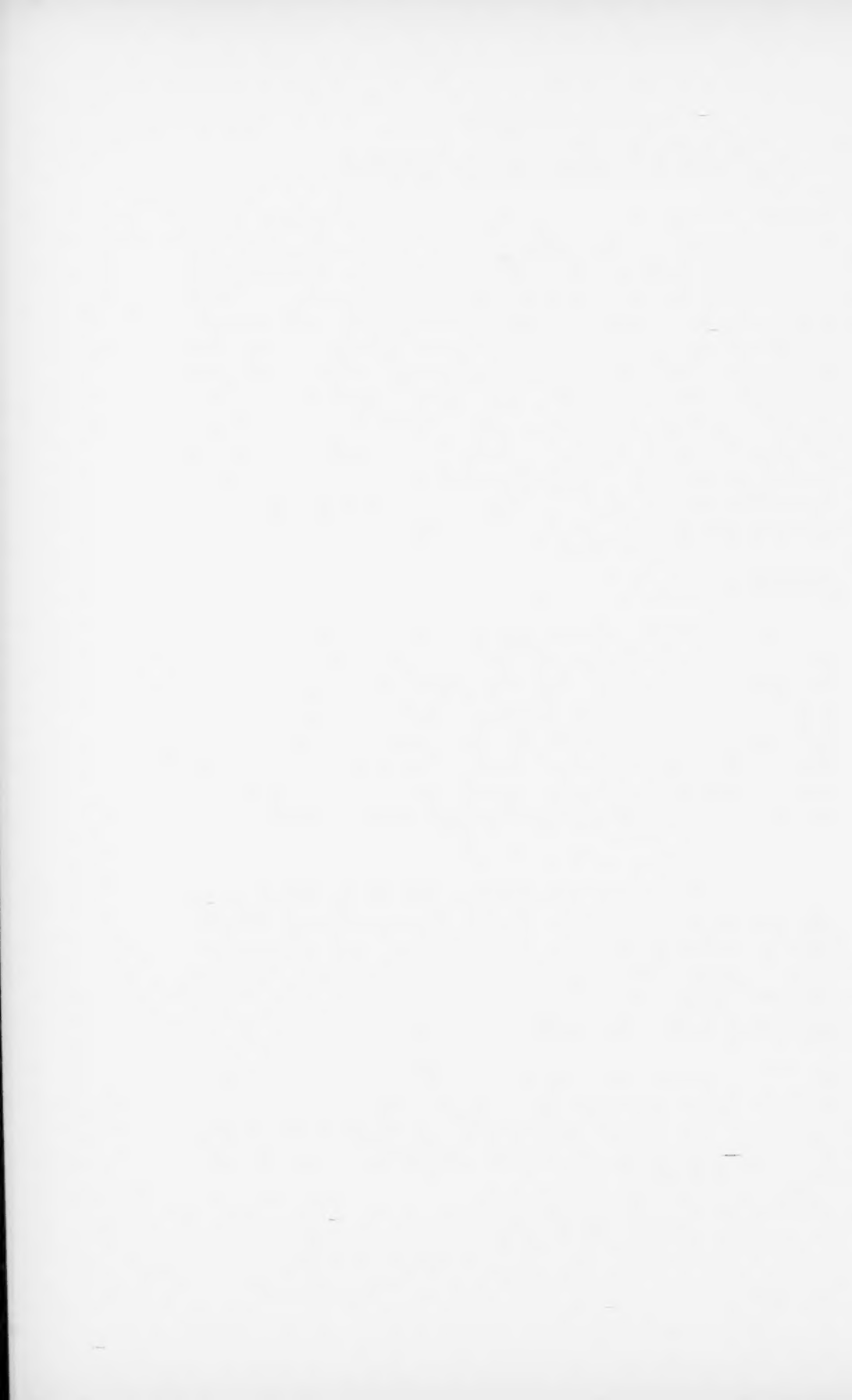
COUNT 70

A. At this particular instance we are talking about a house owned by Jose Jaramillo which he intends to fix up and Tono is trying to figure out which it is. And he is stating we are used to putting those apparatuses. And "apparatus" is a very common term used by Colombians to refer to kilos of cocaine. (Tr. 616)

. . .

A. In this instance these passages I am talking about, Tono is talking about the purchase of a quantity of cocaine, the term "pre-washed" indicates a kilo which has been pre-cut, that it has already been diluent or adulterant.

And at the bottom of the page where Jose Jaramillo says: But it's very pretty, in that instance we are referring to the quality of the cocaine was good. (Tr. 617)



COUNT 71

A. In this instance we every talking about quantity of cocaine. When cocaine comes in in its purist [sic] form it is hard like a rock.

If it has been cut they will have to mash it to cut it, mix the powder with it, and when it's powdery, when they are talking about powder being in the cocaine, it means that it is less pure than the pure form.

So, what he is saying, when he is saying it is more like powder, brother, it means it has more like powder in it than it does the cocaine, so it is less than 50 percent pure cocaine.

Q. On the next page, do you find any further references to the distribution of cocaine?

A. Yes.

In this conversation, the fourth Tono Cuero from the top, Tono Cuero again discussed the blue jeans.

Q. And that, once again, like in the previous conversation is a reference to what?

A. Just previous to that he discussed pre washing of the blue jeans.

So, we are talking about pre-cut kilos of cocaine.

Q. Anything further in that conversation? (Tr. 618)

A. Jose Jaramillo, the third one from the bottom, states:
But, imagine, I sent there a package of these others over there to other people, right? I deliver -- I had delivered to them two ten to some people and five to others.

He is referring to a quantity of cocaine which has been delivered.

Q. Is there anything further in that conversation?

A. No, that would be it.

There are some more there is some more discussion of pre-washing. That's it. (Tr. 619)

COUNT 72

A. He is telling Tono Cuero in this instance that he has to go to wherever Mr. Jaramillo maintains his stash and cutting him, or cutting mill, and pick up the quantity of cocaine which he had ordered.

Q. Now, on the next page there is a reference to Tono Cuero, the first time he speaks on the next page he says: Put aside some six for me.

What does that mean?



Tono Cuero: Says, put aside some six for me, you hear?

Jose Jaramillo: Good.

Some six, seven, around there, I will tell you tomorrow.

In this case we are talking about the delivery of six or seven kilos of cocaine.

Q. That would be a delivery from whom to whom?

A. The cocaine would be going from Jaramillo to Cuero.

Q. Is there anything further in that conversation?

A. Let me check the call for a moment, please.

(Whereupon, at this time there was a pause in the proceedings.)

A. No.

That's it for that conversation.
(Tr. 619-620)

COUNT 73

A. This conversation deals with the arrangements being made for the delivery of cocaine.

Q. When Tono Cuero says at the bottom of the first page, I don't know--



I don't like to leave that thing here, what he is referring to there?

A. He is talking about not like to go leave cocaine there. [sic] (Tr 621)

COUNT 74

A. Again, it is a conversation which deals with the negotiations or the conversations transpiring which will affect the delivery of the cocaine. (Tr 621)

. . .

A. In that instance he doesn't want a lot of people or alot of the attention going to the place wherever they are going to conduct the transaction; that he doesn't want a lot of people seeing him distribute a certain quantity of cocaine. (Tr. 621)

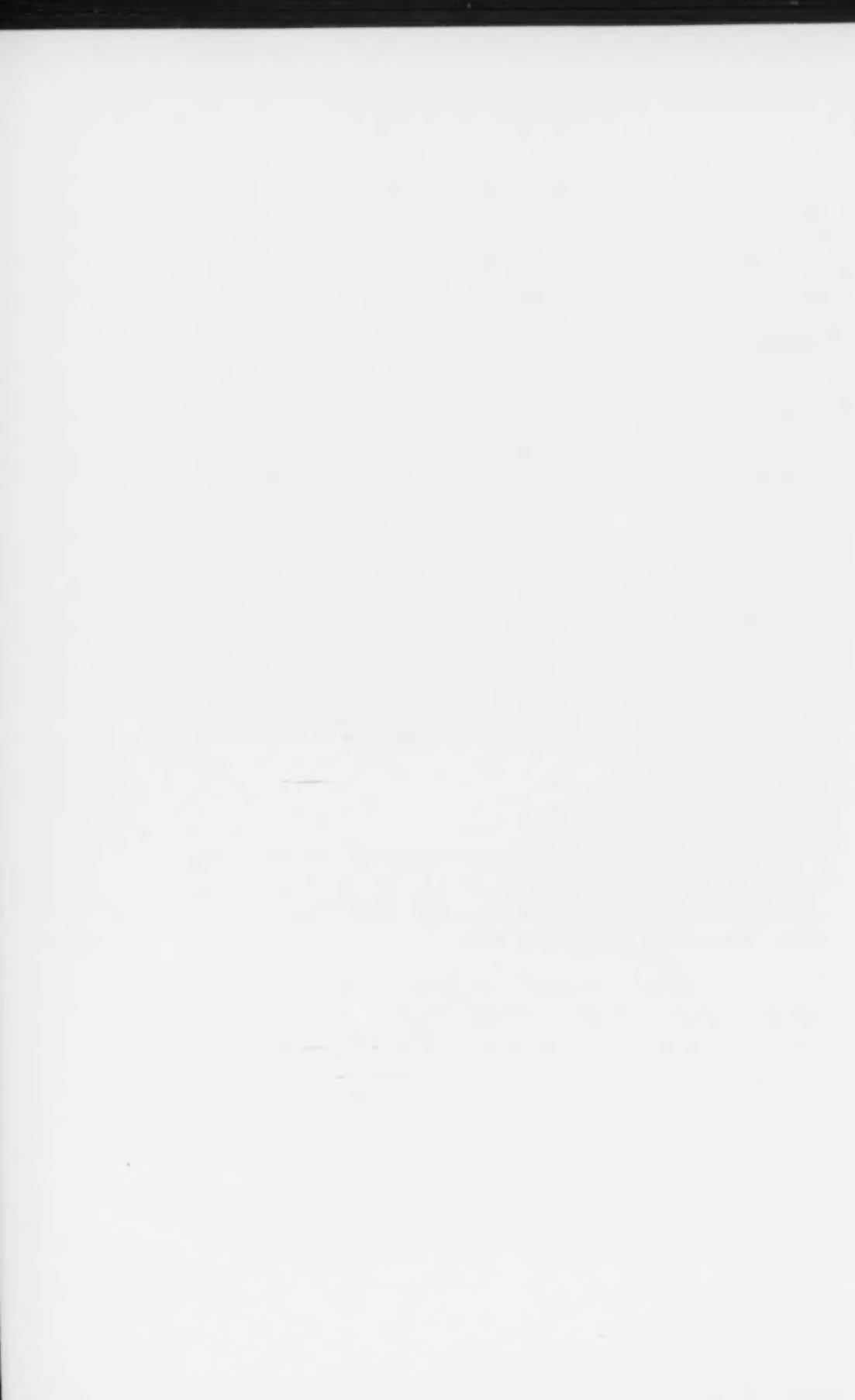
COUNT 75

A. In this particular call the telephone call deals -- it is a follow up call after the delivery of the cocaine to see how the package was.

Tono Cuero states on the 2nd page, page D 23; four Tono Cuero's from the bottom, that everything was fine.

In other words, this meaning that the cocaine which he received as of good quality. He was satisfied with it. (Tr. 622)

COUNT 76

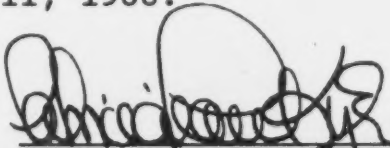


A. That particular instance we're talking about the quality of the cocaine and how fast it moved to the customers. The customers tried it, liked it, came back and bought more. (Tr.626)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing Petition for Writ of Certiorari were mailed by first class United States mail, postage pre-paid to the Solicitor General, Department of Justice, Washington, D.C. 20530 (3 copies), and to Assistant United States Attorney Patricia A. Pileggi, Eastern District of New York, Federal Building, 225 Cadman Plaza East, Brooklyn, N.Y. - 11201 (1 copy), this 12th day of April, 1988.

By:


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